IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.631 OF 1989

1. Smt. Aminbi Shaikh Husain
2. Shri Rafik @ Bhola Abdul
Sattar Pathan ...Appellants.

V/s

The State of Maharashtra ...Respondent

None for the appellants.

Mr. D.P. Adsule for the State.

CORAM: V.M. KANADE, J.
DATE : 23rd February, 2005

ORAL JUDGMENT:

1. Heard the learned APP appearing on behalf of the State. None appears for the appellants.

2. The learned APP appearing for the State has taken me through the judgment and order of the Trial Court as also the evidence adduced by the prosecution. The Trial Court has convicted the accused for having committed an offence punishable under the N.D.P.S. Act and sentenced them to suffer R.I. for 10 years.

3. Prosecution case in brief is that the information was received by the Investigating Officer that two accused were having narcotic drugs in their possession. After receiving this information, the Investigating Officer alongwith one panch Madhuri

Hiwale who was resident of another locality and other members of the Police went to the place where the accused were supposed to come. Accordingly, the raiding party apprehended the accused. It has come in evidence that the Investigating Officer asked the accused whether they would like to take search of the raiding party. This offer was declined by the accused and, therefore, search was taken and brown sugar weighing 7 gms was found with one accused and 1 gm and 400 Mlg. was found with the other accused. The contraband was sealed and was given to the muddemal clerk and an entry was accordingly made. Thereafter, it was sent to the Chemical Analyser who gave a report that the sample which was sent was brown sugar. A charge-sheet was filed. The Trial Court convicted the accused. Appellants have preferred this appeal against the said Judgment and Order.

4. P.W.1 - Shaikh who was the member of the raiding party and who was attached to D.C.B. as P.S.I. has stated in his evidence that they accosted the accused and asked them whether they desired to take search of the members of the raiding party. However, the accused declined to take search of the raiding party. He has further stated that he has received information that the accused No.1.was dealing in narcotic drugs.

He has stated that he conveyed the information in writing to P.I. Pathan. However, this document has not been brought on record. This fact has been reiterated by Panch witness - P.W. 2 Sou Madhuri Hiwale who has also stated that Shaikh had asked the accused as to whether they wanted to take search of the raiding party. From this evidence, it can be seen that there is complete noncompliance of the provisions of section 42(1) as also provisions of section 50 of the N.D.P.S. Act. It is the duty of the Officer to inform the accused of their right that they are entitled to be searched in the presence of an independent Gazetted Officer or the Magistrate. This valuable right was not conveyed to the accused. On the contrary, P.W.1 asked the accused whether they wanted to take search of the raiding party.

5. Further, there is also noncompliance of the provisions of section 42 inasmuch as though the information was received by P.W.1 regarding possession of the drugs by the accused, neither it was reduced into writing nor conveyed to the Superior Officer. Though P.W. 1 in his examination-in-chief has stated that he had given such intimation to P.I. Pathan, such document has not been produced on record. Apart from this lacuna, the only other independent witness

which is examined by the Prosecution is P.W.2 - Madhuri who was a panch residing in another locality. It was the duty of the Investigating Officer to have taken a panch from the same locality which is evident from the provisions of the Code of Criminal Procedure. Thus, the prosecution has failed in complying with the procedure prescribed under the Act. Though it is true that the provisions of sections 42, 50 are not mandatory provisions yet, noncompliance of the said provisions creates serious doubt about the veracity of the evidence of the prosecution witnesses. Under these circumstances, accused are entitled to be released by giving them benefit of doubt.

Accordingly, the following order is passed:-

O R D E R

. Appeal is allowed.

. Accused are acquitted of the offence punishable under sections 17, 21 and 22 of the N.D.P.S. Act, 1985.

. Applicants are on bail. Their bail bonds to stand cancelled.

V.M. KANADE, J.